

BEFORE THE

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Federal Communications Commission NOV 15 1996

WASHINGTON, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Definition of Markets for Purposes of the
Cable Television Mandatory Television
Broadcast Signal Carriage Rules

To: The Commission

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CS Docket No. 95-178

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REPLY COMMENTS OF THE POST COMPANY

I. INTRODUCTION

The Post Company ("Post"), licensee of Station KIFI-TV, Idaho Falls, Idaho, herein submits its reply comments in response to the Report and Order and Further Notice of Proposed Rulemaking in CS Docket No. 95-178 (hereinafter "DMA Report and Order"), 11 FCC Rcd 6201 (1996).

Post files these reply comments in order to clarify its proposal that the Commission modify Section 76.55(e) of its rules to "grandfather" the carriage rights of certain stations with respect to those cable systems which were in the stations' television markets for one election period but not another. In particular, Post addresses the argument of National Cable Television Association, Inc. ("NCTA") against grandfathering of stations because of the associated copyright implications.

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II. POST'S PROPOSAL TO GRANDFATHER CERTAIN STATIONS

In its comments, Post noted the adverse effect on smaller stations of using updated Nielsen DMAs. In particular, Post emphasized the detriment to the public interest that the use of updated DMAs poses. As pointed out, a station often is required, at great expense,¹ to acquire and install additional equipment to ensure the good quality reception of its signal at a cable system's headend. This investment is lost if a cable system that was included in a station's television market for one election period is not within its market for another. For stations with small operating budgets, the investment in signal amplification and the like may be significant. Furthermore, this loss is compounded each time a station installs specialized equipment for carriage on one cable system only to later have to repeat the exercise for another. This significant reduction in its operating budget detracts from a station's ability to provide diverse, quality programming. Clearly, it is not in the public interest to have stations shoulder this substantial, yet unnecessary, burden.

To rectify this inequity, Post suggested that the Commission modify Section 76.55(e) of the Commission's rules.² According to Post's proposal, the effect of this modification will be that a station can continue to demand must-carry on those cable systems for which the station incurred some expense to ensure carriage but which are no longer included in its television

¹ See Comments of The Post Company in CS Docket No. 95-178 (filed October 31, 1996) at 2-3.

² Specifically, Post proposes revising the definition of a "local commercial broadcast television market" in § 76.55(e) to include those cable systems which (1) were included in the station's market for one election period but not the subsequent period; and (2) for which the station incurred some expense to ensure carriage.

market because of the shift in market definitions. By allowing stations confronted with this situation to continue to demand must-carry the public interest will be served, because stations can focus more on providing programming than on providing their signals.

III. NCTA'S ARGUMENT AGAINST GRANDFATHERING OF STATIONS

In its comments in the above-referenced proceeding, NCTA expressed concern that the requirement that a cable operator continue to carry a commercial station during the pendency of a market modification petition³ not be "transformed into the equivalent of grandfathered carriage rights for stations that previously were deemed to be in an ADI, but which are not in the DMA."⁴ NCTA maintains that "a cable operator would be forced to carry what could be deemed to be a distant signal for copyright purposes (without any indemnification for increased copyright liability from the station). . . ."⁵

While NCTA addresses the potential for copyright liability without indemnification in a slightly different context, i.e., with respect to market modification proceedings, Post nevertheless believes it is important to address NCTA's concern.

³ NCTA incorrectly cited § 76.56(c) of the Commission's rules as the source of the requirement that cable operators continue carriage pending the outcome of a market modification proceeding; in fact, it is § 76.59(c) which describes this requirement.

⁴ Comments of The National Cable Television Association, Inc. in CS Docket 95-178 (filed October 31, 1996) at 4.

⁵ *Id.* (parenthetical in original).

**A. Modification of Section 76.55(e) To Grandfather Certain Stations
Should Not Result in Additional Copyright Liability**

As described above, Post proposes that the Commission modify the definition of a "local commercial broadcast television market" in Section 76.55(e) of its rules so that stations, in limited circumstances, can continue to demand carriage on cable systems which are no longer in their television markets. Because the Commission would be modifying Section 76.55(e) to effectuate this proposal there should not be any possibility of increased copyright liability under the current copyright laws.

The determination of copyright liability for a cable system's transmission of a broadcast station's signal turns on whether the station's signal is considered local or distant. The definition of the "local service area of a primary transmitter" is used as the benchmark of whether copyright liability is incurred. The "local service area of a primary transmitter" is

the area in which [a television broadcast station] is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or such station's television market as defined in section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993), or any modifications to such television market made, on or after September 18, 1993, pursuant to section 76.55(e) or 76.59 of title 47 of the Code of Federal Regulations...."

17 U.S.C.A. § 111(f)(1996). In accordance with this definition, the proposed modification of Section 76.55(e) would permit cable systems to continue to carry the grandfathered stations without incurring additional copyright liability.

Moreover, in a 1995 policy statement, the Copyright Office clarified its position on copyright liability by stating that "[t]he copyright local service area is a broadcast station's television market as defined in 47 CFR 76.55(e), which means that is it the station's ADI, plus

any modifications made to the ADI by the Commission under § 76.55 or § 76.59 of its rules." 60 Fed. Reg. 65072, 65074 (Dec. 18, 1995)(hereinafter "1995 Copyright Policy Statement").⁶ Significantly, the Commission regards the Copyright Office's position to be that "any decision made regarding changes in local markets for signal carriage purposes will be applied to the compulsory license process." DMA Report and Order, 11 FCC Rcd at 6221.⁷

The copyright definition of the "local service area of a primary transmitter" and the 1995 Copyright Policy Statement indicate the Copyright Office's acquiescence to broadly defining the "local market." Therefore, modification of the definition of the "local commercial broadcast television station's market" in Section 76.55(e) to reflect the proposed change will not conflict with the copyright laws or the Copyright Office's policies.

IV. CONCLUSION

Stated simply, the proposed modification of Section 76.55(e) as articulated above is an equitable solution to the dilemma smaller stations will face because of the use of updated DMAs. Furthermore, the proposal will serve one of Congress' purposes -- "to ensure the . . .

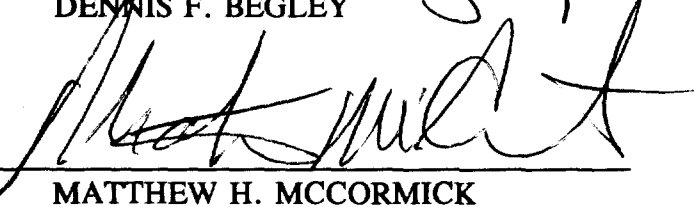
⁶ In light of the fact that the 1995 Copyright Policy Statement was issued before the Commission's change to Nielsen DMAs for market determinations, the quoted statement of the Copyright Office reflects the use of ADIs.

⁷ In the 1995 Copyright Policy Statement, the Copyright Office found that "[i]f the Commission should make modifications to television markets in accordance with §§ 76.55(e) and/or 76.59, or should generate a television market list for the must-carry/retransmission consent election other than at three-year intervals, those modifications should be applied to the[] corresponding compulsory license accounting periods in determining the local service area of a broadcast station." 60 Fed. Reg. at 65074.

availability of free over-the-air broadcasting"⁸ -- by providing smaller stations an opportunity to compete with their larger counterparts.

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November 15, 1996

⁸ See H.R. Rep. No. 628, 102d Cong., 2d Sess. at 27 (1992).

CERTIFICATE OF SERVICE

I, Pamela R. McKethan, hereby certify that on this 15th day of November, 1996, a copy of the foregoing **REPLY COMMENTS OF THE POST COMPANY** was hand-delivered to:

Ms. Dorothy Conway
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Pamela R. McKethan